Supreme Court, U. S.
FILED
MAR 24 1978
MICHAEL RODAK, JR., CLERK

FOR ARGUMENT

(Submitted with the Consent of the Parties)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-528

FEDERAL COMMUNICATIONS COMMISSION,

Petitioner,

v.

PACIFICA FOUNDATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE*

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BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE*

Interest of the *Amicus*

Motion Picture Association of America, Inc. ("MPAA") is a trade association whose membership comprises companies which are among the largest producers and/or distributors of motion pictures in the United States, including:

Allied Artists Pictures Corporation
Avco Embassy Pictures Corp.
Columbia Pictures Industries, Inc.
Metro-Goldwyn-Mayer Inc.
Paramount Pictures Corporation

Twentieth Century-Fox Film Corporation
United Artists Corporation
Universal Pictures, a division of
Universal City Studios, Inc.
Warner Bros. Inc.

All of MPAA's members engage in the production and/or distribution of motion pictures designed for initial exhibition in theatres. These films are subsequently exhibited on pay television, network television, and local television stations. In addition, some of MPAA's members also engage in the production of motion pictures, series and other material designed for initial exhibition on television.

Disposition of the instant case will vitally affect the interests of MPAA's members insofar as it articulates the relevant constitutional considerations governing the control of material disseminated by means of one or more of the various "electronic media." It will also vitally affect the interests of MPAA's members insofar as it influences the content of any future legislation in this area.

MPAA has requested and has received permission from counsel of record for both parties to file this Brief *amicus curiae*.[1]

MPAA believes that the FCC exceeded its jurisdiction by taking the action which is at issue in this case (Point I, *infra*) and, more importantly, that any evaluation by this Court of the underlying constitutional considerations in this area should carefully differentiate between the various "electronic media," particularly radio and pay television (Point II, *infra*).

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[1] Copies of the letters giving permission are being filed with the Clerk of this Court simultaneously with the filing of this Brief.

ARGUMENT

I.

The Federal Communications Commission exceeded its jurisdiction in adopting the Declaratory Order at issue in this case, and the judgment of the Court of Appeals should therefore be affirmed on statutory grounds.

This case presents for consideration by the Court yet another situation "pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 208 (1975).

At issue here is the validity of an FCC *Declaratory Order* which characterizes as "indecent" the broadcast of:

> "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." (App. 15; footnote omitted.)

The Commission issued its *Declaratory Order* in response to the mid-afternoon broadcast by WBAI-FM (New York) of a recorded monologue by comedian George Carlin dealing with uses of and reactions to certain "four-letter words." The FCC employed the WBAI-FM broadcast as the basis for indicating how it would in the future interpret and apply the term "indecent" in the Federal criminal statute prohibiting the broadcast of "any obscene, indecent, or profane language" (18 U.S.C. §1464). The Commission did not contend that the language in question was "ob-

scene," either *per se* or for children alone, and the FCC has clearly indicated that it has no intention of enforcing the statutory term "profane." [2]

The *Declaratory Order* argued that the Commission could prohibit the broadcast of certain non-obscene but nevertheless "indecent" speech on the ground that radio is a uniquely "intrusive" medium whose audience it is difficult, if not impossible, to monitor or shield. (The FCC has elsewhere described its rationale as embodying "the captive audience notion." [3]) The Commission placed special emphasis on the fact that radio broadcasts reach unsupervised children,[4] and also indicated concern that they invade the privacy of the home and reach unwitting adults as well.

Upon petition for review by Pacifica Foundation, the owner of WBAI-FM, a divided Court of Appeals reversed the Commission by a vote of 2-1. *Pacifica Foundation* v. *F.C.C.*, 556 F.2d 9 (D.C.Cir. 1977) (App. 45). Judge Tamm thought that the *Declaratory Order* violated Section 326 of the Communications Act of 1934 (47 U.S.C. §326). Chief Judge Bazelon thought that the Commission's action violated the First Amendment. Judge Leventhal, in dis-

[2] *FCC Obscenity-Indecency Legislative Recommendations*, 122 Cong.Rec. S17101 et seq. (September 29, 1976), at pages S17106-S17107.

[3] *Id.* at S17106.

[4] As indicated in the preceding textual paragraph, we do not understand the Commission to contend that the language which the *Declaratory Order* defines as "indecent" is obscene for children. See *Ginsberg* v. *New York*, 390 U.S. 629 (1968). Rather, we understand the Commission to contend that, in a "captive audience" situation, children are less able (or willing) to seek escape than adults would be. Although the *Declaratory Order* did not define the term "children," the FCC has subsequently indicated that it means those under the age of 12. *FCC Obscenity-Indecency Legislative Recommendations, supra*, at S17106.

sent, indicated some reservations about the precise terms of the *Declaratory Order* but would have upheld it at least as applied to WBAI-FM's broadcast of the Carlin monologue.

In its most far-reaching sense, the *Declaratory Order* raises what Judge Tamm described as "the perplexing question of whether the FCC, because of the unique characteristics of radio and television, may prohibit non-obscene speech or speech that would otherwise be constitutionally protected" (App. 46). We do not think it is either necessary or desirable for this Court to decide that question here, for we believe that the *Declaratory Order* exceeds the Commission's jurisdiction in any case.

We do not doubt the seriousness of the Commission's concerns or the sincerity of its efforts to cope with what is clearly an "intractable" [5] problem. Nor do we doubt that WBAI-FM's deliberate mid-afternoon broadcast "of words which are undeniably regarded as offensive by many people" [6] displays, at best, a certain lack of circumspection. However, no matter how laudable the Commission's objectives (or, conversely, no matter how imprudent Pacifica's conduct), the FCC simply lacks the authority to do what it did in this case.

Certainly, affixing the statutory label "indecent" to the substantive standard enunciated in the *Declaratory Order* does not suffice to bring the Commission's action within its jurisdiction. The label alone is not controlling. *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 441 (1957).

As the Eighth Circuit recently observed in striking down certain FCC rules the adoption of which were found to ex-

[5] *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 704 (1968) (opinion of Harlan, J.).

[6] Brief for Pacifica Foundation in the Court of Appeals, page 5.

ceed the Commission's jurisdiction, "governmental agencies are limited to the exercise of power delegated by the Congress. . . ." *Midwest Video Corporation* v. *F.C.C.*, —— F.2d ——, 3 Med.L.Rep. 1817, 1828 (8th Cir. 1978). Here, the most Congress has delegated to the FCC is concurrent authority to enforce the standards set forth in 18 U.S.C. §1464. It has *not* empowered the FCC to legislate altogether new and different prohibitions in the guise of "clarify[ing] the applicable standards" (App. 17). Of course, "[w]henever the law draws a line there will be cases very near each other on opposite sides," *United States* v. *Wurzbach*, 280 U.S. 396, 399 (1930), but there are several reasons which compel the conclusion that the *Declaratory Order* steps well over the FCC's jurisdictional line.

First, the FCC and the Department of Justice have concurrent power to enforce Section 1464. Yet there is nothing in the Record which even remotely indicates that the Department has approved, acquiesced in or will follow the Commission's interpretation of the statutory term "indecent." Indeed, the most recent case indicates that the Department will be compelled to adhere to a more narrow standard in any Section 1464 prosecutions instituted by it. *United States* v. *Simpson*, 561 F.2d 63 (7th Cir. 1977).[7] As this Court held in a strikingly analogous situation more than two decades ago, "[t]here cannot be one construction for the Federal Communications Commission and another for the Department of Justice." *F.C.C.* v. *American Broadcasting Co.*, 347 U.S. 284, 296 (1954).

[7] There are very few reported decisions under Section 1464. In addition to *Simpson*, see *United States* v. *Smith*, 467 F.2d 1126 (7th Cir. 1972); *Tallman* v. *United States*, 465 F.2d 282 (7th Cir. 1972); *Gagliardo* v. *United States*, 366 F.2d 720 (9th Cir. 1966). See also: *Duncan* v. *United States*, 48 F.2d 128 (9th Cir. 1931), *cert. denied*, 283 U.S. 863 (1931).

Second, the statutory term "indecent" has long since been drained of any independent validity as a standard in this area. See, e.g., *Hamling* v. *United States*, 418 U.S. 87 (1974); *United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123, 130 n. 7 (1973); *Roth* v. *United States*, 354 U.S. 476 (1957). The Commission nevertheless argues that presence of the word "indecent" in Section 1464 authorizes it to develop and apply altogether new substantive standards in a variety of discrete factual contexts. In this proceeding, the FCC proscribed the broadcast of certain language "at times of the day when there is a reasonable risk that children may be in the audience" (App. 15). At the same time, however, the Commission said that its proscription did not apply to live news broadcasts containing the same language (App. 43 n. 1) and that it might not apply to broadcasts "during the late evening hours" (App. 15). In another proceeding, the FCC has ruled that the term "indecent" could not be extended to encompass televised portrayals of violence. *Polite Society, Inc.*, 55 F.C.C.2d 810 (1975). And in its Brief before this Court, the Commission describes the *Declaratory Order* as *"ad hoc"* and indicates that the standards announced therein might be "applied, modified or extended" under "a different set of facts."[8]

The Commission claims to be doing all of this in order to "clarify the applicable standards" (App. 17). But what the FCC is doing isn't the clarification of existing standards; it is the legislation of altogether new standards.

In the face of more than two decades of decisions invalidating use of the statutory term "indecent" as an independent standard in this area, and in the absence of any affirmative Congressional action in response thereto, the Commission's assertion of power certainly demands a clear and unmistakable expression of legislative intent.

[8] Brief for Petitioner FCC, pages 42-43.

None is to be found. Compare *F.C.C.* v. *American Broadcasting Co., supra; Regents* v. *Carroll,* 338 U.S. 586 (1950); *Midwest Video Corporation* v. *F.C.C., supra.* See also: *Peters* v. *Hobby,* 349 U.S. 331 (1955).

Third, Section 1464 is a penal statute, and must therefore be "construed strictly." *F.C.C.* v. *American Broadcasting Co., supra,* at 296. There is no question, however, that the FCC's interpretation of "indecent" in this proceeding is expansive. Compare *Rabe* v. *Washington,* 405 U.S. 313 (1972) (per curiam). It not only lacks support in the decided cases,[9] but also lacks support in the "regulatory caselaw" [10] which the Commission cites in support of itself. The FCC's construction of "indecent" in previous proceedings involving WUHY-FM (1970)[11] and WGLD-FM (1973)[12] was much narrower than it is here. Those proceedings defined "indecent" as language which was patently offensive and utterly without redeeming social value.

Fourth, the *Declaratory Order* directly prohibits the use of constitutionally protected speech during portions of the broadcast day. At a minimum, the First Amendment requires a clear and firm jurisdictional base before an administrative agency may engage in regulation of the type which the Commission has undertaken here. *Home Box Office, Inc.* v. *F.C.C.,* 567 F.2d 9 (D.C.Cir. 1977), *cert. denied,* 46 U.S.L.W. 3216 (October 3, 1977). In this case there is absolutely no indication that Congress intended to confer such jurisdiction upon the FCC.

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[9] See footnote 7, *supra,* and accompanying text.

[10] Brief for Petitioner FCC, page 14.

[11] *Eastern Educational Radio,* 24 F.C.C.2d 408 (1970).

[12] *Sonderling Broadcasting Corp.,* 27 R.R.2d 285 (1973), *reconsideration denied,* 41 F.C.C.2d 777 (1973), *aff'd sub nom. Illinois Citizens Committee for Broadcasting* v. *F.C.C.,* 515 F.2d 397 (D.C. Cir. 1974), *rehearing en banc denied,* 515 F.2d 407 (D.C.Cir. 1975).

In short, the Commission's purposes in issuing the *Declaratory Order* were obviously well-intentioned, but its jurisdiction is not thereby rendered open-ended. No matter how serious the problem confronting the FCC in this area, "administrative expansion of [Section 1464] does not provide the remedy." *F.C.C.* v. *American Broadcasting Co., supra,* at 297 (footnote omitted). Adoption of the *Declaratory Order* clearly exceeded the Commission's authority, and the judgment of the Court of Appeals should therefore be affirmed on statutory grounds.

II.

Any evaluation by this Court of the underlying constitutional considerations in this area should carefully differentiate between the various "electronic media."

This case involves radio. It does *not* involve television, cable television, pay television or any one of the various new electronic technologies which are now emerging (videodiscs, pre-recorded videotapes, cable systems with two-way communications capability, etc.).

Nevertheless, the Commission is now employing the rationale of the *Declaratory Order* and the substantive standards enunciated therein as the basis for legislative proposals which apply "to *all* electronic media." *FCC Obscenity-Indecency Legislative Recommendations,* 122 Cong.Rec. S17101 et seq. (September 29, 1976), at page S17109 n. 97 (emphasis added).

We have indicated above (Point I, *supra*) that we do not believe it is either necessary or desirable for this Court to reach the underlying constitutional considerations in this area in order to decide the instant case. This is a nascent

field of law, and any constitutional ruling at this point would seem premature. See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 102 (1973). However, to the extent that this Court's decision involves *any* evaluation of the applicable constitutional standards, we believe it is essential to distinguish between what several recent opinions have referred to without differentiation as the "broadcast media," [13] the "electronic media," [14] and the "electronic broadcast media." [15]

Obscenity, either *per se* or for children alone, is not an issue here. We do not contest the power of the FCC, with appropriate legislative authorization,[16] to proscribe the dissemination by "electronc media" of material which is obscene *per se*. *Miller* v. *California*, 413 U.S. 15 (1973). Nor does this case raise the constitutional problems which would be presented by an FCC attempt to proscribe the dissemination by electronic media of material which is obscene for children alone. See *Erznoznik* v. *City of Jacksonville*, *supra*, at 212-214; *Ginsberg* v. *New York*, 390 U.S. 629 (1968); *Butler* v. *Michigan*, 352 U.S. 380 (1957).

Rather, what is at issue here is the constitutional propriety of the FCC's attempt to prohibit the dissemination

[13] *Buckley* v. *Valeo*, 424 U.S. 1, 49-50 n. 55 (1976) (per curiam).

[14] *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, *supra*, at 99; *Carey* v. *Population Services International*, 431 U.S. 678, 712 n. 6 (1977) (opinion of Powell, J.).

[15] *Bates* v. *State Bar of Arizona*, 45 U.S.L.W. 4895, 4904 (June 27, 1977).

[16] Section 1464 refers to obscene "language." The Commission's legislative proposals would apply to both obscene language and obscene visual portrayals. *FCC Obscenity-Indecency Legislative Recommendations*, *supra*, at S17102. The FCC's proposed definition of "obscene material," *id.* at S17101, raises certain questions, but we do not think it is necessary to comment upon these here.

by electronic media of material which is "offensive" without being obscene. The FCC calls such material "indecent," but its label is beside the point.

The FCC's position with respect to "indecent" material evolved in a series of four Commission cases—WUHY-FM (1970),[17] WGLD-FM (1973),[18] WBAI-FM (1975),[19] and WXPN-FM (1975)[20]—all of which involved radio and all of which "relied crucially upon the differences between radio and other media. . . ." [21] The rationale underlying all of these cases was that radio is a uniquely "intrusive" medium whose audience it is difficult, if not impossible, to monitor or shield.

The dissemination of non-obscene but nevertheless "offensive" material by means of radio may well require "resourceful efforts to cushion rather than resolve clashes between the First Amendment and interests conflicting with it." Bickel, *The Morality of Consent* 78 (1975). See also: *Kovacs* v. *Cooper*, 336 U.S. 77, 81 (1949); *Hudson Water Co.* v. *McCarter*, 209 U.S. 349, 355 (1908).

However, the FCC no longer limits its intrusiveness rationale to radio and now seeks to have it applied to *all* "electronic media." *FCC Obscenity-Indecency Legislative Recommendations*, *supra*, at S17101, S17105-S17106. Its legislative proposals would prohibit equally the dissemination of "indecent" as well as "obscene" material by elec-

[17] *Eastern Educational Radio*, *supra*, footnote 11.

[18] *Sonderling Broadcasting Corp.*, *supra*, footnote 12.

[19] *Pacifica Foundation*, 56 F.C.C.2d 94 (1975), *clarified*, 59 F.C.C.2d 892 (1976), *rev'd sub nom. Pacifica Foundation* v. *F.C.C.*, 556 F.2d 9 (D.C.Cir. 1977), *cert. granted*, 46 U.S.L.W. 3436 (January 9, 1978).

[20] *Trustees of the University of Pennsylvania*, 57 F.C.C.2d 782 (1975).

[21] Brief for Petitioner FCC, page 11.

tronic media as disparate as radio and pay television."[22] And the Commission's proposed definition of "indecent" is derived directly from the *Declaratory Order* in this case. *Id.* at S17109 n. 118.

Accordingly, *any* evaluation by this Court of the underlying constitutional considerations in this area will impact directly upon the future course of the FCC's legislative proposals. Our primary concern is with pay television, a relatively new medium which provides to its subscribers a variety of programming services, including unedited and uninterrupted motion pictures produced for initial exhibition in theatres. Pay television programming is exhibited on a special channel, which may be viewed *only* by those who subscribe to and pay for it.[23] See, generally, *Home Box Office, Inc.* v. *F.C.C., supra.*

The motion pictures exhibited on pay television are not obscene, but some of them might be considered "indecent" under the FCC's definition of that term. Because we believe the First Amendment raises an insuperable obstacle to application of the FCC's indecency concept to non-obscene material exhibited on pay television, we have outlined below some of the constitutional considerations which differentiate pay television from radio.

[22] The FCC's proposed legislation, *id.* at S17101, and the explanation which accompanied it, *id.* at S17109 n. 104, S17109-S17110 n. 121, contemplate certain affirmative defenses to a charge that "indecent" material was disseminated by means of electronic media. However, we are here concerned with matters of constitutional right, not statutory grant.

[23] Pay television programming is currently distributed by means of cable, scrambled over-the-air signals, and multi-point distribution systems. In this context, the mode of distribution is of no constitutional significance since in all modes pay television programming is available only to those who subscribe to it.

As of December 31, 1977, a total of 1,733,611 U.S. households subscribed to pay television. *The Pay TV Newsletter,* March 8, 1978, page 1.

First, the constitutional ability of the FCC to prohibit the dissemination of non-obscene but nevertheless "indecent" material by means of "electronic media" is wholly dependent upon "the captive audience notion."[24] Each electronic medium, however, "tends to present its own peculiar problems." *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 503 (1952). At one extreme is radio, a ubiquitous and omnipresent medium to which everyone has uncontrolled and uncontrollable access. It is found not only in homes, but also in automobiles and restaurants and on sidewalks and beaches. And all of radio's numerous stations are available simply by turning the dial, or may be heard simply by being within earshot of someone who turns the dial. The potential of radio for making "an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it," *Redrup* v. *New York,* 386 U.S. 767, 769 (1967) (per curiam), is therefore not insubstantial. At the other extreme is pay television, a medium whose locations are limited (usually to the home) and whose reception requires constitutionally significant choice and affirmative action on the part of its subscribers. Electing to receive pay television programming is therefore analogous to purchasing a ticket of admission to a motion picture theatre.

Second, when an individual buys a radio, he is merely purchasing a piece of equipment. All of the programming broadcast thereon comes with it, whether he likes it or not and whether he finds it "offensive" or not. When an individual subscribes to pay television, however, he is purchasing a discrete programming service, knowing in advance that one of its features is unedited theatrical motion pic-

[24] *FCC Obscenity-Indecency Legislative Recommendations, supra,* at S17106.

tures. Thus, subscribing to pay television represents a deliberate, wholly volitional decision to obtain certain kinds of programming, and no privacy rights are invaded by the exhibition of non-obscene motion pictures which might be considered "indecent" by the FCC.

Third, anyone of any age, including unsupervised children, can purchase and possess a radio. By contrast, subscribing to pay television requires dealings with the company providing such service, installation of special equipment, and the payment of monthly bills—all in the context of the home. These functions will be performed by or with the authorization of parents, not children. Thus, to the extent that children are exposed to pay television programming, their parents have made a deliberate, knowing choice to have such material available in the home. See *Ginsberg* v. *New York, supra,* at 639; *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972).

In sum, whatever the merits or demerits of the Commission's position with respect to radio, pay television presents altogether different constitutional and common sense considerations. Any evaluation by this Court of the applicable constitutional standards in this area should therefore carefully differentiate between the various "electronic media."

CONCLUSION

For the reasons set forth above, the judgment of the U.S. Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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